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Office of Administrative Law Judges
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CASE NOS.: 2001-LHC-02281
2002-LHC-00891
2002-LHC-00892

OWCP NOS.: 01-145495
01-137569
01-150632

In the Matter of

CLINTON E. COLLAMORE, Sr.
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

Appearances:

James W. Case, Esquire (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Stephen Hessert, Esquire (Norman, Hanson & DeTroy), Portland, Paine, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from claims for worker's compensation benefits filed by Clinton E. Collamore, Sr. (the Claimant) against the Bath Iron Works Corporation (BIW), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the claims were referred to the Office of

Administrative Law Judges for hearing. Pursuant to notice, a formal hearing which was conducted before me in Portland, Maine on February 5-6, 2002, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of BIW. The Claimant testified at the hearing, and documentary evidence was admitted at the hearing without objection as Claimant's Exhibits ("CX") 1-21 and Employer's Exhibits ("EX") 1-52. Hearing Transcript ("TR") 7-8, 36, 49. At the close of the hearing, the record was held open until April 6, 2002 to allow the parties time to offer additional evidence and to submit written closing argument. The post-hearing time frame was extended at BIW's unopposed request, and BIW timely offered the following evidence:

Deposition of Memana S. Abraham, taken on May 14, 2002 EX 53; and

Deposition of Michael W. Mainen, M.D., taken on May 14, 2002 EX 54.

No objection was raised by the Claimant, and the testimony taken at these post-hearing depositions has been admitted into evidence. Both parties filed helpful closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that the Claimant is entitled to an award of compensation for a period of temporary total disability and a scheduled award of permanent partial disability compensation. I further conclude that the Claimant is entitled to interest on unpaid compensation, medical care for a work-related knee condition and attorneys fees. Finally, I conclude that BIW is entitled to a credit against the compensation awarded in the amount of past voluntary compensation payments. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The case consists of three claims with three separate dates of injury – May 30, 1996, September 5, 1998, and October 21, 1999. At the hearing, the parties stipulated with respect to the claimed injury of May 30, 1996 that: (1) the Claimant alleges that kneeling on grating while working at BIW caused him to have left knee pain; (2) there is jurisdiction under the Act on this date of injury; (3) there was an employee/employer relationship at the time of this injury; (4) a compensable left-knee injury occurred at that time; (5) the average weekly wage ("AWW") for that date of injury is $649.28; (6) payments for temporary total disability for various periods were made from October 21, 1999 to August 20, 2000 based on a lower AWW so that BIW acknowledges that the Claimant is due an adjustment; and (7) the Claimant was paid partial disability benefits capped at $224.54 per week from August 21, 2000 to September 18, 2000 when the Claimant was paid a scheduled permanent partial disability award based on a two percent disability of each knee. TR 68-69.

With respect to the claimed injury of September 5, 1998, the parties stipulated that: (1) the claim relates to an injury to the right foot; (2) the claim was timely filed and controverted, (3)

there was jurisdiction under the Act, (4) an employee/employer relationship existed at the time of this injury; (5) the injury arose out of and in the course of the Claimant's employment; (6) the AWW for this date of injury was $699.94; and (7) the Claimant was paid temporary total disability compensation for this injury from November 8, 1998 to May 20, 1999. TR 70.[1]

Regarding the claimed injury of October 21, 1999 injury, the parties stipulated that: (1) the injury is alleged to be a bilateral knee injury; (2) there is jurisdiction under the Longshore Act; (3) there was an employee/employer relationship on the date of the alleged injury; (4) the AWW on the date of alleged injury was $600.47; and (5) there is no work available at BIW within the Claimant's restrictions. TR 71,103.

The parties are thus in agreement that the Claimant suffered compensable injuries on May 30, 1996 and September 5, 1998, and there is no issue raised with respect to his entitlement to benefits under the Act based on these injuries. The parties' stipulations are fully supported by the evidence of record, and I adopt them as my findings. Although the parties agree that there is no work available at BIW within the Claimant's limitations, they have significant differences with respect to the claim based on the alleged October 21, 1999 knee injuries. The Claimant contends that he suffered a gradual injuries to his knees bilateral knee injury that is causally related to his employment at BIW, that he was unable to find alternative employment and that he is, therefore, entitled to total disability compensation since October 21, 1999 through the present time as he remains unavailable to work due his full-time participation in a vocational rehabilitation program. TR 72-74.[2] BIW disputes whether the Claimant's knee condition is causally related to his employment, and it challenges the nature and extent of any disability, asserting that it has produced labor market survey evidence that there is suitable alternative employment available to the Claimant. TR 74-76. BIW also stated that it contested all other issues relating to the October 21, 1999 injury, including the timeliness of notice. TR 71. However, it has offered no evidence or argument in support of its position on timeliness or any other issue.

[1] The Claimant entered into these stipulations but noted that he contends that the September 5, 1998 injury involved more than his right foot. TR 70.

[2] In his post-hearing memorandum, the Claimant states that he is seeking an award of permanent total disability compensation from March 21, 1999. Claimant's Post-Hearing Memorandum at 2. This appears to be a typographical error since the record, as discussed below, indicates that the Claimant worked at BIW until October 21, 1999.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant was born in 1960 and completed 11 years of school before leaving high school during his senior year to get married and begin work. He later obtained a GED around 1982. Before he was hired by BIW in May 1982 at the age of 21, he worked on a farm, in a boat shop doing finish work on kayaks and canoes, and in a sardine cannery. TR 78-79. The Claimant also served as a selectman for nine years for the Town of Waterboro, the last three years of which he was the chairperson. TR 113.

When hired by BIW in May 1982, the Claimant was placed in an outside machinist position which is responsible for most of the equipment that operates the ships built at the BIW shipyard. TR 79-80. He was assigned to a pre-outfit team which installed grating after a structure or cross-section of a ship is built as well as walkways and ladders. TR 80-81. The Claimant testified that he spent approximately four hours a day on his knees installing the grating, while the rest of his workdays were spent setting up and taking down the work area. TR 83. Around 1990, the Claimant left production work for three years to hold elected local offices in a union representing BIW employees. TR 85-86. Upon completion of his union service, the Claimant returned to his outside machinist job with the pre-outfit team, and he worked in this capacity for the duration of his employment at BIW. TR 85.

The Claimant testified that he used leather pads to protect his knees from the metal surfaces and, when the leather pads were not enough, he added welding pads as a cushion. TR 88. Despite these measures, the Claimant said that he began to experience daily pain in both knees which he reported to BIW in May 1996. TR 88-91. After he was seen by BIW's first aid department, the Claimant was referred to Robert Phelps, Jr., M.D., an orthopedic surgeon who diagnosed the Claimant with recurrent patella chondromalacia and instituted restrictions that included minimal stair climbing, squatting, kneeling, "scooching" [sic], ladder climbing, and deck work. CX 6 at 47-48. After reporting the knee problems, the Claimant continued his usual work at BIW. TR 91-92.

On September 5, 1998, the Claimant twisted his leg when his right foot was caught between a pipe and a T-bar. TR 92. As a result of this injury, the Claimant said that he had symptoms in his foot, leg, knee and lower back. TR 93. He received a nerve block injection in the ankle, and he testified that although he has residual tingling in his feet, the ankle problems have not caused him any difficulty in walking. TR 94-95. The Claimant testified lower back pain initially made it difficult for him to walk, but his back condition improved over time. TR 96-97. As a result of the September 5, 1998 injury, the Claimant was out of work from November 1998 until May 1999, after which time he returned to work as an outside machinist in the pre-outfit job. TR 97. The record shows that when he saw Dr. Phelps in June 1999 for reevaluation of his injury, he complained of pain and swelling in the right knee. Dr. Phelps reported that the knee condition was work-related, and he wrote work restrictions to minimize the Claimant's kneeling and crawling. CX 9 at 288-289.

After returning to work, the Claimant testified that his knees continued to bother him, and he was referred by his primary care physician, Dr. Davey, to Dr. Wickenden in the Fall of 1999 because Dr. Phelps had by then retired. TR 97-98. The record shows that Dr. Davey took the Claimant out of work on October 21, 1999. CX 9 at 295. The Claimant was next seen on November 22, 1999 by Dr. Wickenden's physician assistant who diagnosed probable torn medial meniscus cartilage in both knees and placed the Claimant on work restrictions of no kneeling, crawling, squatting or climbing. CX 8 at 100; CX 9 at 302-303. The Claimant has not returned to work at BIW since October 21, 1999 because BIW does not have any work available within these restrictions. TR 101. On December 27, 1999, Dr. Wickenden examined the Claimant and diagnosed his knee condition as bilateral patellofemoral pain syndrome. CX 8 at 101. At this time, Dr. Wickenden stated that the Claimant could return to modified duty, and he suggested that the Claimant should be retrained for work that does not involve kneeling, crawling, squatting or ascending ladders and ramps. *Id.* Dr. Wickenden has continued to treat the Claimant with injections of Synvisc, a joint lubricant, and he is of the opinion that the Claimant has a permanent impairment to both knees which preclude him from any work requiring kneeling, crawling or squatting. CX 8 at 108; TR 22-23, 28.

After he was put out of work on October 21, 1999, the Claimant made several contacts to his union and BIW management in an effort to find work within his restrictions, and he met with the BIW President and Chief of Human Resources in May 2000 to discuss his situation. TR 101-103. Following this meeting, Maria Mazzorra, M.D., BIW's Chief of Occupational Medicine, wrote to Dr. Wickenden on June 12, 2000, and requested a clarification of what the Claimant was capable of doing. CX 9 at 321. Dr. Wickenden responded in a letter dated June 30, 2000 that the Claimant could do a desk job with no kneeling, crawling or squatting and no repetitive climbing of ladders, ramps or stairs. CX 8 at 108-109. BIW's Ergonomic Program reviewed these restrictions in July 2000 and determined that there was no work available. CX 9 at 322.

The Claimant began looking for alternative employment in August 2000. TR 104-05. He thought he had secured a job as a security guard at a state prison, but Dr. Wickenden would not clear him to take a required agility test for the position. TR 105-106. Thereafter, in October 2000, the Claimant applied for vocational rehabilitation assistance from the OWCP. TR 106-107. He was assigned a counselor and underwent a battery of tests. TR 107-108; CX 13. The counselor determined that direct job placement would not provide the Claimant wages consistent with his average weekly wage, and a formal retraining plan in a two-year public administration program through the University of Maine was approved. TR 108; CX 13 at 358, 361. The Claimant began classes in January 2001, but the OWCP suspended vocational rehabilitation services after three weeks when it learned that he was not currently receiving indemnity benefits. TR 108-109; CX 13 at 387-388. The Claimant, however, continued studies on his own, and he sought assistance from the State of Maine's Department of Vocational Services which essentially adopted the OWCP rehabilitation plan. TR 109. The state agency agreed to pay for all expenses related to the Claimant's vocational rehabilitation, including for a change in the transmission of the Claimant's truck from standard to automatic because driving a standard transmission vehicle aggravated his knee pain. TR 110; CX 12 at 340-341. The Claimant testified that he is presently enrolled in a bachelor's degree program in public administration, and he attends classes full time,

four days a week. TR 111-112. He testified that he has maintained a "B" average and anticipates it will take him at least four years to complete the program. TR 112-113. The plan originally approved by the OWCP was for a total of 93 weeks commencing on January 16, 2001 and ending on December 20, 2002. CX 13 at 386. As a result of the interruption caused by the OWCP's suspension of the rehabilitation plan, the Claimant's expected graduation date was pushed back to May 2003. *Id.* at 390-91. No evidence was presented that either the OWCP or the State Department of Vocational Services approved extension of the rehabilitation plan beyond May 2003.

B. Timeliness of Notice

Section 12 of the Act provides that, except for cases involving an occupational disease, written notice of an injury or death must be given to the OWCP within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment. 33 U.S.C. §912(a)-(c). However, section 12(d) provides that failure to give the required notice will not bar a claim if the employer of its insurance carrier had actual knowledge of the injury or death, if it is determined that the employer or carrier has not been prejudiced by the failure to give notice, or if the failure to give notice is excused. 33 U.S.C. § 912(d). Pursuant to section 20(b) of the Act, it is presumed, in the absence of substantial evidence to the contrary, that the employer has been given sufficient notice pursuant to section 12. 33 U.S.C. § 920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 145-146 (1989); *Stevenson v. Linens of the Week*, 688 F.2d 93, 97-98 (D.C. Cir. 1982). Accordingly, an employer contesting the timeliness of notice must come forward with substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990). As discussed above, BIW has not introduced any evidence or argument in support of its position that the Claimant failed to give timely notice of the October 21, 1999 injury. Therefore, there is no substantial evidence to rebut the presumption that timely notice was given.

C. Causal Relationship Between the October 21, 1999 Injury and Employment at BIW

A worker seeking benefits under the Act must, as a threshold matter, establish that he suffered an "accidental injury . . . arising out of and in the course of employment." 33 U.S.C. 902(2); *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*). The Claimant is aided in carrying his burden by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A

claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Brown,* 194 F.3d at 4, citing *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.,* 19 BRBS 149, 151 (1986).

There is uncontradicted evidence that the Claimant has had knee problems dating to at least 1996 which he related to prolonged kneeling in his work at BIW as an outside machinist. In addition, the Claimant testified that he had right knee symptoms following the September 5, 1998 work-related twisting injury to his right leg, and he testified that both knees continued to bother him after he returned to work from the September 5, 1998 injury so that he sought medical attention on October 21, 1999. Dr. Davey, who saw the Claimant on October 21, 1999 and diagnosed an effusion of the left knee, concluded that the condition was work-related. CX 9 at 294-295. And, Dr. Wickenden, the Claimant's treating orthopedic specialist since November 1999, has similarly concluded the Claimant's bilateral patella chondromalacia is work-related. CX 8 at 101-107, 110, 114-117; TR 26. Based on this evidence, and noting that a work-related aggravation of a pre-existing condition constitutes an injury within the meaning of the Act; *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981); I find that the Claimant has established a *prima facie* case that he sustained an injury to his knees on October 21, 1999 that arose out of and in the course of his employment at BIW.

Since the Claimant has made a *prima facie* showing of a work-related injury, BIW, as the party opposing entitlement, must produce substantial evidence severing the presumed connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Sprague v. Director, OWCP*, 688 F.2d 862, 865-66 (1st Cir. 1982). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion; *Richardson v. Perales*, 402 U.S. 389, 401 (1971); and an employer successfully establishes rebuttal by offering "reasonable probabilities" of non-causation. *Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 675 (1st Cir. 1998). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

BIW's case against causation rests on reports and testimony from Michael W. Mainen, M.D., a board-certified specialist in occupational medicine. Dr. Mainen reviewed medical records provided by the Employer and examined the Claimant in January 2002. EX 47. Dr. Mainen's diagnosis was chronic bilateral knee pain of undetermined etiology and a right medial meniscus cartilage tear. *Id.* at 484. He disagreed with Dr. Wickenden's diagnosis of bilateral patella chondromalacia, finding no evidence to substantiate the presence of this condition. *Id.* On this point, Dr. Mainen stated that the results of MRIs taken in December 1999 were not compatible with a diagnosis of patellar chondromalacia. *Id.* He also noted that Dr. Wickenden's physician's assistant reported no pain on manipulation of the patella, a negative finding which he described as inconsistent with chondromalacia of the patella, and he concluded,

> My examination a little more than two years later suggested generalized tenderness, which is a non-specific physical finding, and not what one typically sees in patellar chondromalacia. In view of these factors—the absence of documented suggestive physical findings, the absence of MRI evidence of patellar chondromalacia (normal appearance of the patellae), and the absence of any confirmatory direct visual evidence from arthroscopy, I think the diagnosis of patellar chondromalacia is highly unlikely if not essentially ruled out.

Id. With respect to the left knee, Dr. Mainen saw no evidence of a meniscal tear, and he was at a loss to explain the cause of the Claimant's left knee pain. *Id.* Dr. Mainen found that the MRI showed a torn meniscus in the right knee which he attributed to some unknown event unrelated to work:

> Mr. Collamore suggested that right knee pain had begun in 1998 and he related it to a problem with his right ankle or foot. And indeed the letter of referral indicated that the claim with respect to the 9/05/98 date of injury is to the right foot or the back. However, that a problem with either the foot or the back would cause knee pain in an individual of Mr. Collamore's age is unlikely. Only if the patient had chronic degenerative changes in the joint would a disturbance of his gait possibly aggravate his knee. We know from his MRI scan that he does not have chronic degenerative changes in the joint. It is far more likely that the right knee pain resulted from an acute medial meniscal tear. If there's no report of such an acute injury at work, then presumably the tear occurred outside of work.

Id. at 485. In a subsequent report dated January 29, 2002, Dr. Mainen reviewed the MRI interpretations of radiologist Mark Piccirillo, M.D., and stated that Dr. Piccirillo found evidence of a right meniscal tear but no evidence of patella chondromalacia. EX 48. He noted that the Claimant had given a history of right knee pain in 1998 without any history of an acute right knee injury at work, and that the Claimant had told him that the physicians who treated him in 1998 attributed the knee pain to a distorted gait caused by a right ankle problem. *Id.* at 490. Dr. Mainen further stated that he had not reviewed the records from the physicians who treated the Claimant in 1998, and he added the following observations about the etiology of the Claimant's knee pain:

> The conclusions that his doctors allegedly made might have been correct. Or perhaps the knee pain was due to a meniscal tear that occurred at that time. Or the meniscal tear might have occurred at some other time. I have no idea where it occurred, but I assume that if the patient had an acute injury at work he would have reported it.

Id. He concluded that the reason for the Claimant's bilateral knee pain is unknown and that his right knee pain could be due to the torn meniscus. *Id.* at 491. Dr. Mainen testified at a post-hearing deposition taken on May 10, 2002. EX 54. He stated that he did not have any evidence that the Claimant's left knee problem is causally related to his work at BIW. *Id.* at 16. He further

testified that based on his review of the diagnostic studies, he did not think that the torn meniscus in the right knee was related to the Claimant's work at BIW because it the tear appeared to have been caused by a single, traumatic injury rather than a cumulative, degenerative phenomenon:

> That – you would expect to see that more in a degenerative meniscus, a complex tear. And this is – this looks like a simple tear, which usually occurs from the point event. But we have no history of a point event having occurred at work. I can't imagine why he would not report such an event had it happened. And I'm not aware that – that he has reported such an event.

Id. at 18. Dr. Mainen also stated that the Claimant had not told him of any "point event" and that, based upon this lack of history, he did not causally connect the Claimant's torn right meniscus to his work at BIW. *Id.* at 20. Finally, Dr. Mainen discussed videotape surveillance evidence (EX 37), which shows that Claimant climbing onto a sawhorse to work on a truck while leaning his knees against the truck, and he testified that the Claimant's ability to tolerate some degree of pressure on his kneecaps during this activity is contraindicative of chondromalacia because kneecap tenderness is one of the cardinal symptoms of chondromalacia. *Id.* at 21-22.

In my view, Dr. Mainen's reports and testimony do not constitute the type of substantial evidence that is required to rebut the section 20(a) presumption of causation. He did not identify any reasonable probabilities of non-causation or state unequivocally, to a reasonable degree of medical certainty, that the Claimant's knee condition is unrelated to his employment. Although he disagreed with Dr. Wickenden's diagnosis of bilateral patella chondromalacia, he offered no opinion on the cause of the Claimant's left knee pain. Dr. Mainen suggested that the Claimant's right knee pain could be due to the torn meniscus cartilage, but he admitted that he had no idea when the Claimant tore the right meniscus, and he simply speculated that the injury that caused the tear must have occurred outside of work because there is no evidence that the Claimant ever reported any "point event" or acute injury. Thus, Dr. Mainen stated that he would not find the Claimant's knee condition causally related to his employment at BIW because there was "no evidence" and "no history" to establish a causal connection. EX 54 at 16, 20. In appropriate circumstances, "negative" or circumstantial evidence can rise to the level of substantiality, but the evidence must be "specific and comprehensive" to sever the presumed connection between an injury and a worker's job. *Swinton*, 554 F.2d at 1083. I find that Dr. Mainen's opinions on causation amount to no more than speculation and conjecture which is not specific and comprehensive enough to overcome the Act's presumption that the Claimant's knee condition is related to his employment.

Moreover, even if it is assumed that BIW had successfully rebutted section 20(a)'s presumption of causation, I conclude, after weighing all of the relevant evidence of record without regard to any presumption, that a preponderance of the evidence establishes that the Claimant's knee condition is causally related to his employment at BIW. *See Brown*, 194 F.3d at 5 (where presumption is rebutted, it falls out of the case, and the claimant bears the burden of establish causation based on the record as a whole). I reach this conclusion because I find for the

reasons discussed below that the contrary opinion offered by Dr. Wickenden is, on balance, better reasoned and better supported by the objective medical evidence.

Dr. Wickenden testified at the hearing that he is a board-certified orthopedic surgeon, specializing in arthroscopic and total knee replacement surgery, hip replacement and emergency room trauma medicine. TR 10-11. He stated that he obtained the Claimant's history and has examined his knees several times over the period that he has been his treating physician since November 1999. TR 11-13. Dr. Wickenden testified that his diagnosis of the Claimant's knee condition is patello-femoral pain syndrome related to chondromalacia patella. TR 16-17. He explained that patello-femoral pain syndrome involves a process known as chondromalacia patella which refers to a softening of the articular cartilage between the patella or kneecap and the top of the femur that is initially accompanied by pain and progresses to degeneration. TR 19-21. He also explained that the term chondromalacia is very broad and is no longer used as a diagnosis as he had done in 1999. *Id.* Dr. Wickenden said that the Claimant's knee condition is directly related to the accumulation of trauma over time from the hours that he spent kneeling on hard surfaces at work, rather from any one fall. TR 25-26. He testified that he had reviewed Dr. Mainen's report and said that he did not believe that the Claimant's findings and symptoms are consistent with a torn meniscus. TR 35. He noted that he had previously reviewed the results of the MRI conducted in December 1999 but did not see any meniscal tear. TR 15-16, 35. He reviewed the MRI report from Dr. Piccirillo (EX 48 at 492-493) at the hearing and said that although there was an abnormal signal in the meniscus, he did not consider the finding grossly abnormal, and he he pointed out that radiologists differ on whether such abnormal signals indicate an actual tear or simply degeneration. TR 37-38. He continued that it is his opinion that one would have to see an abnormality on several different images, from inferior to superior, for a meniscal tear to be of significance. TR 38-39. He said that he often sees abnormalities similar to those described by Dr. Piccirillo in the MRI report, but he would not recommend surgery on the basis of Dr. Piccirillo's findings. TR 39. Dr. Wickenden testified with regard to the tentative diagnosis of bilateral torn menisci made by his physician assistant that a torn meniscus is the most common differential diagnosis in patients with complaints of patello-femoral pain and that the two diagnoses are frequently made interchangeably. TR 39. Regarding the cause of the Claimant's knee condition, Dr. Wickenden testified,

> Clint and I have also had that discussion of exactly what his job entailed and actually I got a lot of history from Dr. Mainen's history and his report also details a lot of that history, and I, I believe you asked do I have an opinion as to causal? I think that's directly related to why we're here today. I feel that it's caused an effect. I have no history of anything else in Clint's background that has led to this problem. I have every reason to believe that his pain in his knee is directly related to 19 years or 16 years or whatever it is on his knees, and it's a very, very common reason I see patients from Bath Iron Works.

TR 48.[3] On cross-examination, Dr. Wickenden stated that he "absolutely" stood by his diagnosis of patello-femoral pain syndrome and that he would not change his diagnosis or treatment plan even if he were to agree that the Claimant also has a torn meniscus. TR 55-56. He further testified that his opinion on causation is based on the Claimant's history of repetitive kneeling, squatting and climbing while working at BIW and the absence of any history of other injuries. TR 57. In this regard, Dr. Wickenden said that he was aware of the Claimant's injury in 1998 when his right foot was caught and twisted, but it is his opinion that this injury was not the cause of the Claimant's knee condition, though it could have been a factor in when his knees became symptomatic. TR 59.

Dr. Wickenden thus based his opinion on the cause of the Claimant's knee condition on the Claimant's history of repetitive kneeling on hard surfaces, climbing and squatting at BIW and concluded that the Claimant's patello-femoral pain syndrome is a direct result of accumulative trauma sustained over the course of his employment. The history relied upon by Dr. Wickenden is consistent with the Claimant's description of his work as an outside machinist, and I note that BIW offered no evidence to contradict the Claimant's testimony which I find credible. In contrast, Dr. Mainen made general statements about a lack of evidence or history of a "point event" to connect the Claimant's knee problems to his employment, but he did not address the effect of the Claimant's repetitive kneeling. As discussed above, I have found Dr. Mainen's opinion on causation unpersuasive, and I find that it is clearly outweighed by the more detailed and thorough conclusions reached by Dr. Wickenden. In addition, I note that Dr. Wickenden not only had the advantage of having examined the Claimant's knees on multiple occasions over a period of three years, he possesses superior orthopedic credentials to those of Dr. Mainen. Finally, I find that Dr. Wickenden adequately explained why his diagnosis and opinion on causation would not change even if it were determined that the Claimant has a torn right meniscus, and I give little weight to Dr. Mainen's opinion that Dr. Wickenden's diagnosis is contradicted by the Claimant's truck repair activities on the surveillance videotapes because Dr. Mainen admitted that he could not tell how much pressure that Claimant placed on his kneecaps while

[3] BIW's objection on foundation grounds to the question which elicited this testimony is overruled as I find that facts assumed by Dr. Wickenden in forming his opinion on causation is consistent with the Claimant's credible and uncontradicted testimony regarding the physical requirements of his outside machinist job at BIW.

leaning against the body of the truck. EX 54 at 22.[4] For these reasons, and noting that there is no other evidence in the record addressing the question of causation, I conclude that the Claimant has established by a preponderance of the evidence in this record and without benefit of the section 20(a) presumption that his knee condition arose out of and in the course of his employment at BIW.[5]

C. Nature and Extent of the Claimant's Disability

Disability is generally addressed in terms of its nature, temporary or permanent, and its degree or extent, partial or total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991). The Claimant asserts that in view of BIW's stipulation that there is no work available at the BIW shipyard, the absence of any evidence of suitable alternative employment and his inability to pursue alternative employment because he is participating in a full-time vocational retraining program, he is entitled to an award of permanent total disability compensation pursuant to the Board's decision in *Abbott v. Louisiana Ins. Guar. Ass'n.*, 27 BRBS 192, 202 (1993) (*Abbott*), *aff'd sub nom, Louisiana Ins. Guar. Ass'n. v. Abbott*, 40 F.3d 122 (5th Cir. 1994). Claimant's Post-Hearing Memorandum at 6-8. BIW responds that any disability suffered by the Claimant should be considered permanent based upon Dr. Wickenden's opinion that he reached a point of maximum medical improvement on September 8, 2000. BIW Post-Hearing Memorandum at 9-10. Based on a finding of permanency, BIW further urges a determination that the Claimant is limited to the scheduled benefits prescribed under section 8(c)(2) of the Longshore Act, that BIW has already satisfied its obligations to the Claimant under section 8(c)(2) based on past payments in excess of his entitlement, and that BIW is entitled to a credit for the overpayment of benefits that it has made. *Id.* at 10. Lastly, BIW advances several arguments, which are discussed in greater detail below, against a finding that the

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[4] It is noted that Dr. Piccirillo did not address causation, and he only partially contradicted Dr. Wickenden's diagnosis. That is, Dr. Piccirillo's impression of the Claimant's right knee included "[p]ossible subtle limited weight-bearing chondromalacia at the periphery of the medial femoral chondyle and medial tibial plateau in the area of meniscal abnormality" in addition to findings consistent with a tear through the inferior articular surface and free edge of the medial meniscus. EX 48 at 492. Dr. Piccirillo found no MRI evidence of "weight-bearing chondromalacia" of the left knee. *Id*. at 493. Dr. Wickenden's diagnosis is also supported by the initial radiology report from Peter E. Giustra, M.D. who interpreted the December 1999 MRI results as showing chondromalacia patella; CX 5 at 44; and by the Claimant's first treating orthopedist, Dr. Phelps whose diagnosis was recurrent chondromalacia patella. CX 6 at 47.

[5] BIW seeks an express finding that the Claimant's injury to his right foot has completely resolved and that the record evidence does not show that a back injury occurred as a result of the 1998 incident. BIW Post-Hearing Memorandum at 9. Since no claim has been made in this case of continuing disability related to the Claimant's right foot or that he suffered a work-related back injury in 1998, I find it unnecessary to make the requested findings.

Claimant is entitled to any benefits while he is not working due to his participation in vocational rehabilitation. Id. at 10-14.

1. Nature of Disability – Temporary or Permanent?

To be considered permanent, a disability need not be eternal or everlasting; it is sufficient that the "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979), citing *Watson v. Gulf Stevedoring Corp*., 400 F.2d 649, 654 (5th Cir. 1968). *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional measure for determining whether a disability is temporary or permanent is whether the medical evidence establishes that the injured worker has reached maximum medical improvement. *Seidel v. General Dynamics Corp*., 22 BRBS 403, 407 (1989). As BIW points out, Dr. Wickenden stated in a letter dated September 8, 2000 that he believed that both of the Claimant's knees had reached a point of maximum medical improvement. CX 8 at 111. Dr. Mainen disagreed and suggested that it is premature to place the Claimant at maximum medical improvement based on the fact that the etiology of Claimant's bilateral knee pain remains unclear and the fact that Claimant's right torn meniscus tear has not been surgically repaired. EX 54 at 30. At the hearing, Dr. Wickenden testified that although that the Synvisc injections have provided the Claimant with temporary relief from his knee symptoms, the "natural history of patellofemoral pain is that it will slowly, gradually become more bothersome to him" and that the "underlying condition will not get better." TR 51-52. Dr. Wickenden's testimony also made it clear that while there is a possibility that surgical repair of a torn meniscus might alleviate some knee symptoms, it would not alter the course of the underlying patello-femoral pain syndrome. TR 40-41. In my view, Dr. Wickenden's opinion that the Claimant has reached a point of maximum medical improvement is better reasoned and more persuasive. Moreover, the mere possibility of improvement at some future date does not preclude a finding that disability is permanent. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Serv*., 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, 204, *aff'd on recon.*, 20 BRBS 26 (1987). *Cf. Dixon v. John J. McMullen and Assoc.*,19 BRBS 243, 245 (1986) (disability is not permanent when the worker's condition was continuing to improve and where there is no medical evidence that he had reached maximum medical improvement). Accordingly, I find that any disability involving the Claimant's knees has been permanent since September 8, 2000. I further find that any disability prior to September 8, 2000 was temporary in nature.

2. Extent of Disability – Total or Partial?

BIW voluntarily paid temporary total disability compensation to the Claimant for the period of October 21, 1999 through August 20, 2000. Although it contends that the Claimant's entitlement to compensation for this period derives from the stipulated May 30, 1996 left knee injury rather than the claimed bilateral knee injury of October 21, 1999, it has not challenged the extent of the Claimant's disability through August 20, 2000. Since the parties have stipulated that there is no work available at BIW within the Claimant's physical restrictions, BIW concedes that

the Claimant is entitled to a finding of total disability unless it demonstrates that suitable alternative employment was available. BIW Post-Hearing Memorandum at 10. *See also Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986); *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). BIW has not contended that there was any suitable alternative employment available to the Claimant through August 20, 2000. Accordingly, I find that the Claimant was under a temporary total disability from October 21, 1999 through August 20, 2000. While BIW reduced its voluntary compensation payments to a partial disability rate commencing August 21, 2000, I further find, in the absence of any demonstration of suitable alternative employment, that the Claimant's entitlement to temporary total disability continued until September 8, 2000, the date on which the Claimant's disability became permanent.

The Claimant's disability status beginning on September 8, 2000 is more problematic. BIW contends that inasmuch as the Claimant's injury is to his knees, his entitlement to permanent disability compensation is limited to the scheduled benefits prescribed in section 8(c)(2) of the Act, and it asserts that it has more than satisfied its obligations to the Claimant under section 8(c)(2) because it paid him 11.52 weeks of benefits which exceeds the 5.6 weeks to which he is entitled based upon a 2% permanent impairment of his left knee. BIW Post-Hearing Memorandum at 9-10. The Claimant argues that his disability should continue to be classified as total at least until November 30, 2000 when BIW obtained a labor market survey establishing the availability of suitable alternative employment. Claimant's Post-Hearing Memorandum at 6. The Claimant further argues that he has met his burden of showing that the jobs identified in the labor market survey are not available to him, thus continuing his entitlement to a total disability finding, by enrolling in the vocational rehabilitation program. *Id.* at 7.

The validity of BIW's position depends on whether the Claimant's disability after September 8, 2000 is classified as partial or total since the exclusive recovery specified in section 8(c)(1) - (20) for so-called scheduled injuries only applies to cases of permanent partial disability. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17 (1980). If the Claimant's disability after September 8, 2000 is total, then section 8(c)(2) is irrelevant, and the Claimant's compensation entitlement to permanent total disability compensation would be controlled by section 8(a). *Id.* To defeat the claim of total disability, BIW introduced labor market surveys conducted in November 2000 and February 2002 and the testimony of Memana Abraham, a certified rehabilitation counselor who conducted the surveys. Based on the November 30, 2000 labor market survey (EX 36), in which he identified 60 employment opportunities in the period from October 23, 2000 and November 30, 2000 as suitable for the Claimant in view of the limitations identified by Dr. Wickenden, Mr. Abraham testified that it was his opinion that the Claimant had an earning capacity in November 2000 of $280.00

to $450.00 per week. EX 53 at 10-11.[6] Mr. Abraham further testified that it was his opinion based upon the second labor market survey that he conducted in February 2002 (EX 53, Deposition Exhibit 2) that the Claimant had an earning capacity at that time of $360.00 to $500.00 per week. *Id.* at 19-20. Mr. Abraham explained that he had obtained additional information from the Claimant about his experience as a selectman chairman and union official as well as his familiarity with computers that enabled him to identify additional, higher-paying positions as being available and suitable for the Claimant based on Dr. Wickenden's restrictions. *Id.* at 20.

BIW's vocational evidence clearly establishes, and the Claimant does not dispute, that there were suitable alternative jobs in existence at the time of the November 30, 2000 labor market survey and that suitable jobs continued to exist at the time that the second labor market survey was conducted in February 2002. The Claimant's initial argument that BIW's showing of suitable alternative employment can only be given effect as of the date of the labor market survey, November 30, 2000, draws support from decisions by several courts which rejected the interpretation of the Benefits Review Board that a later showing of suitable alternative employment could presumptively be applied retroactively to the date of maximum medical improvement. *See Palombo v. Director, OWCP*, 937 F.2d 70, 77 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258-60 (9th Cir. 1990). However, all of these courts recognized that an employer is not precluded from retroactively establishing the availability of suitable alternative employment as long as its showing is supported by substantial evidence. *See Palombo*, 937 F.2d at 77 ("This does not mean that an employer cannot satisfy its burden by showing the existence of jobs at an earlier point in time, even if they no longer exist."); *Berkstresser*, 921 F.2d at 313 (ALJ's finding that suitable alternative employment was available retroactive to the date of maximum medical improvement should be affirmed if supported by substantial evidence); *Stevens*, 909 F.2d at 1260 ("This does not prevent an employer from satisfying the ALJ that there was suitable alternative available work at the time of maximum medical improvement, even several years after that point. The employer merely needs to overcome the inherent limitations of credible and trustworthy evidence."). BIW has not shown that the specific jobs identified by Mr. Abraham in November 2000 as suitable for the Claimant were open and available on September 8, 2000, but the labor market survey does show that the low unemployment rates in the Claimant's geographic area declined even further between July and August 2000. EX 36 at 87.[7] When this unemployment

[6] The Claimant's objection on foundation and competence grounds to the deposition question that produced this testimony is overruled. Mr. Abraham's *curriculum vitae* (EX 53, Deposition Exhibit 1) establishes that he is qualified to offer an opinion on earning capacity, and his labor market survey provides an adequate factual foundation for his opinion.

[7] According to statistics cited by Mr. Abraham from the State of Maine Department of Labor, unemployment rates showed the following declines from July to August 2000: 3.2% to 2.7% (Augusta); 2.0% to 1.8% (Bath/Brunswick); 1.9% to 1.6% (Rockland); and 2.5% to 2.1% (Belfast). EX 36 at 87.

rate information is considered in light of the large number of specific job openings identified between October 23, 2000 and November 30, 2000, I find that the BIW has produced substantial evidence that suitable alternative employment was available to the Claimant from September 8, 2000, the date of maximum medical improvement. Moreover, I find that requiring BIW to show that there were specific job openings on September 8, 2000 would, in the circumstances of this case where it is clear that the Claimant's disability does not foreclose all employment, amount to enforcement of a "mechanical rule" which the Court of Appeals for the First Circuit, in which this matter arises, rejected in *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1979). *See also Argonaut Ins. Co. v. Director, OWCP*, 646 F.2d 710, 711 (1st Cir. 1981). Therefore, I conclude on this record that BIW has met its burden of showing that suitable alternative employment has been available to the Claimant since September 8, 2000.

The Claimant next contends that notwithstanding BIW's showing of suitable alternative employment, he is entitled to a finding of total disability under the Board's *Abbott* decision because he was unavailable to work by virtue of his participation in the vocational rehabilitation program. BIW acknowledges that *Abbott* and subsequent decisions by the Board hold that a claimant can establish total disability by showing that suitable alternate employment is not reasonably available due to participation in a rehabilitation program sponsored by the Department of Labor, but it contends that the instant case is distinguishable from any of the cases where the Board has affirmed findings of total disability when a worker participates in vocational rehabilitation. Specifically, BIW argues that continuing total disability benefits should be denied pursuant *Brown v. Nat'1 Steel and Shipbuilding Co.*, 34 BRBS 195 (2001) (*Brown*) because the Department of Labor has not approved, sponsored or in any way continued involvement in the Claimant's vocational rehabilitation efforts. BIW Post-Hearing Memorandum at 13-14. It further argues that denial of continuing total disability benefits during vocational rehabilitation is also warranted under *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (*Gregory*) because the Claimant has failed to show: (1) that BIW was aware of and did not object to the rehabilitation program; (2) that the completion of the program would benefit BIW by increasing his wage-earning capacity; (3) that he has been fully diligent in completing the program; and (4) that he was unable to work during the retraining program. *Id.* at 14. Finally, BIW submits that vocational rehabilitation is not necessary in this case and will not serve to lower its liability because the labor market evidence shows that the Claimant already has an earning capacity of up to $500.00 per week and because BIW had already satisfied its compensation liability to the Claimant by paying him permanent partial disability compensation pursuant to section 8(c)(2) long before he commenced vocational rehabilitation. *Id.* at 13-14.

In weighing the merits of the Employer's arguments, it is important from the outset to bear in mind that many of the several factors relied upon by the Board and the Court in *Abbott* are not by themselves determinative of an injured worker's entitlement to continuing total disability benefits while he or she participates in vocational rehabilitation. *Bush v. J.TO. Corp.*, 32 BRBS 213, 219 (1998) (factual differences from Abbott are not determinative as long as the rationale underlying *Abbott*, serving the Act's goal of promoting the rehabilitation of injured workers to restore them as productive members of the workforce, is applicable). *See also Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, BRB No. 96-0971 (Apr. 25, 1997) (unpublished), slip op.

at 4. In light of this guidance, I find no merit to BIW's contention that the Claimant forfeits any entitlement to total disability compensation because he hasn't shown that the OWCP has maintained involvement in his rehabilitation program or that BIW was aware of and did not object to the plan. In *Brown*, the Board rejected an employer's argument that *Abbott* should not be extended to state-sponsored rehabilitation programs, holding that "[c]ontrary to employer's position, claimant's approved enrollment in a retraining program committing him to a definitive course of rehabilitation, whether in a state- or federally-sponsored program, satisfies the fundamental policies underlying the Act and its humanitarian purposes." 34 BRBS at 198. The Board did specifically note in *Brown* that the Department of Labor had approved the state-sponsored plan and notified the employer that it would perform a monitoring role, but I conclude that the particular level of Federal participation was not essential to the Board's holding that a "claimant, pursuant to *Abbott*, may establish that identified suitable alternative employment is not available due to his participation in a state-sponsored, and DOL approved, vocational rehabilitation program." *Id.* Here, the Claimant's uncontradicted evidence establishes that the OWCP approved his retraining plan which, in my view, is sufficient to satisfy *Brown*'s basic requirements for a finding of total disability.[8] Indeed, it would seem incongruous to make a claimant's entitlement to an *Abbott* award of rehabilitation benefits dependent on the level of Federal involvement, especially where, as in this case, the record reflects that the OWCP suspended the Claimant's rehabilitation plan because BIW had refused to pay compensation. To conclude otherwise would effectively place an injured worker's rehabilitation rights in the exclusive control of his employer which clearly be inconsistent with the fundamental policies underlying the Act and its humanitarian purposes. For similar reasons, I also find BIW's reliance on *Gregory* to be misplaced. BIW is correct that the Board, in its first *Gregory* decision, remanded the case to the ALJ to consider whether the employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, BRB No. 96-0971 (Apr. 25, 1997) (unpublished), slip op. at 3-4; and that there is no evidence that it agreed to the Claimant's state-sponsored retraining plan.[9] If this one factor was dispositive, authority over a claimant's rehabilitation rights would be ceded to the sole discretion of an employer, a result which I find to be incompatible with the purposes and policies of the Act. Accordingly, I conclude that the Claimant's failure to establish that BIW either approved of or did not object to his rehabilitation plan does not, standing alone, extinguish his

[8] It is noted that the record does indicate that the OWCP has continued to monitor the Claimant's rehabilitation after sponsorship was assumed by the state agency. CX 13 at 390-91.

[9] In its second *Gregory* decision, the Board found it unnecessary to consider the factor of employer agreement because the claimant stipulated that she had obtained part-time employment while attending vocational rehabilitation classes. Because the claimant admitted that she had been able to work while participating in vocational rehabilitation, Board held that *Abbott* was distinguishable and that denial of total disability benefits was appropriate. 32 BRBS at 267.

right to total disability compensation while participating in the state-sponsored rehabilitation program.[10]

I also find no merit to BIW's arguments that the Claimant has not shown diligence in completing the rehabilitation program or that the rehabilitation will benefit BIW. While there is evidence that the Claimant has extended the length of the program, a factor which in my opinion would legitimately come into play in determining the extent of BIW's compensation liability,[11] there is no evidence that he has been less than fully diligent in pursuing his studies and completing the program. Indeed, the rehabilitation records indicate that the Claimant had been a successful and cooperative student. The rehabilitation plan also shows, as does BIW's labor market evidence, that the Claimant's earning capacity without retraining is substantially lower than his pre-injury AWW but that his earning capacity after retraining is expected to well exceed his earnings at BIW. CX 13 at 358, 361, 387. Thus, the Claimant's completion of vocational rehabilitation will benefit BIW by reducing the likelihood that he will be unable to secure suitable alternative employment in the future which would expose BIW to liability for total disability compensation. *See Brown*, 34 BRBS at 198.

I do, however, find merit in BIW's argument that the Claimant has failed to show that he was unable to secure suitable alternative employment while participating in the state-sponsored vocational rehabilitation. As the Board held in *Kee v. Newport News Shipbuilding & Drydock Co.*, 33 BRBS 221, 223 (2000), the burden is on a claimant to establish that suitable alternative jobs were not realistically available while he was participating in rehabilitation. In *Abbott*, the claimant met this burden because the rehabilitation plan precluded him from working. 40 F.3d at 128. In this case, there is no evidence that the Claimant's rehabilitation plan prohibits him from working. Therefore, the burden was on the Claimant to show that he "diligently sought but was unable to obtain suitable alternate employment" while receiving vocational rehabilitation services. *Kee*, 33 BRBS at 223. On this record, the Claimant has made no such showing, relying instead on the erroneous position that his participation in vocational rehabilitation perforce establishes that suitable alternative employment is unavailable. Consequently, his claim for continuing total disability benefits after the date of maximum medical improvement must be denied. *Kee*, 33 BRBS at 223-224.

As discussed above, the Claimant's disability commencing on September 8, 2000 is controlled, in the absence of evidence of continuing total disability, by section 8(c)(2) of the Act

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[10] The source of the employer approval factor is unclear. The Act provides the Secretary of Labor with authority to direct the vocational rehabilitation of permanently disabled employees. 33 U.S.C. § 939(c)(2). However, that Act makes no mention of any employer role in approving rehabilitation, and the applicable regulations are likewise silent on employer involvement or approval. *See* 20 C.F.R. §§ 702.501 - 702.508.

[11] *See Gregory v. Norfolk Shipbuilding & Dry Dock Co.*,BRB No. 96-0971 (Apr. 25, 1997) (unpublished), slip op. 4 n.3.

which provides for compensation at 2/3 of the worker's AWW for 288 weeks for the loss of a leg. 33 U.S.C. §908(c)(3). Disabilities arising from an injury to the knee are treated as a loss or partial loss of use of a leg under section 8(c)(2). *See generally Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 67 (2d Cir. 1985). In a case such as this where the loss or loss of use is partial, compensation is based on the proportionate loss or loss of use of the member. 33 U.S.C. §908(c)(19). That is, the percentage of the Claimant's loss of use of his knees must be applied to the number of weeks set forth in section 8(c)(2) to arrive at the proportionate number of weeks of compensation. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (1986). The only evidence in the record relating to the percentage of loss is found in the reports and testimony from Dr. Wickenden. In his September 8, 2000 letter to BIW, Dr. Wickenden stated that the Claimant has a two percent permanent impairment of physical function of each knee which amounts to a four percent "whole body" impairment based on Table No. 62 from the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th ed. CX 8 at 111. At the hearing, Dr. Wickenden testified that the four percent whole body impairment rating converts under the AMA Guides to a five percent impairment of each lower extremity, or a total loss of ten percent. TR 52-54. Dr. Wickenden further testified that the same table from which he calculated the five percent loss for each leg is contained in the current, fifth edition of the AMA Guides. TR 55. Based on Dr. Wickenden's uncontradicted medical opinion, I find that the Claimant has suffered a five percent loss of use of each leg which is compensable under section 8(c)(2) of the Act at 2/3 of the applicable AWW multiplied by 28.8 weeks.

D. Compensation Due and Credits

In view of my finding that the Claimant suffered a work-related injury, patello-femoral pain syndrome, to both of his knees on October 21, 1999, I conclude that the Claimant is entitled to an award of temporary total disability compensation at 2/3 of the stipulated AWW of $600.47 beginning on October 21, 1999 through September 7, 2000. 33 U.S.C. § 908(b). Commencing September 8, 2000, the Claimant is entitled to payment of 28.8 weeks of compensation based on a five percent loss of use of both legs at 2/3 of the stipulated AWW of $600.47. 33 U.S.C. § 908(c)(2). Since the parties have also stipulated that the Claimant has previously received payments for periods of temporary total and permanent partial disability compensation, I find that BIW is entitled to a credit in the amount of its prior compensation payments pursuant to section 14(j) of the Act. *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *aff'd on recon.*, 23 BRBS 241 (1990).

E. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News*

Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). Accordingly, I find that BIW is liable for all reasonable and necessary medical care as required by the Claimant for treatment of his work-related bilateral knee condition.

G. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28 of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney has filed an itemized application for attorney's fees and expenses for work performed before the Office of Administrative Law Judges in the amounts of $7,189.50 and $2885.52, respectively, for a total of $10,075.02. The fees are based on an hourly attorney rate of $195.00 for the Claimant's attorney and a paralegal rate of $55.00 per hour. BIW has not filed any objection to the fee application.

Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. Although no objection was raised to the requested fees, consideration has been given to whether a reduction is warranted based on the Claimant's failure to prevail on his claim for continuing total disability compensation after September 8, 2000. However, the time spent by the Claimant's attorney cannot be readily demarcated between the successful and unsuccessful aspects of the claim. As this record does not provide a reliable means of identifying services spent in furtherance of the unsuccessful claim to continuing total disability, I conclude that reduction is not appropriate, and I will order BIW to pay the full amount of the requested fees and costs. *Cf. General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 325-26 (1st Cir. 1988) (upholding ALJ's reduction of fees where claimant

prevailed in disability claim but failed to succeed on separate claim of retaliation under section 49 of the Act), *cert. denied*, 488 U.S. 92 (1988).

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Bath Iron Works Corporation, shall pay to the Claimant, Clinton E. Collamore, Sr., temporary total disability compensation pursuant to 33 U.S.C. § 908(b) at the weekly compensation rate of $400.31 for the period commencing on October 21, 1999 through September 7, 2000, subject to the Employer's credit pursuant to 33 U.S.C. § 914(j) in the amount of its past voluntary payments of total and partial disability compensation between October 21, 1999 and September 18, 2000;

2. The Employer shall pay to the Claimant permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(2) at the weekly rate of $400.31 for a period of 28.8 weeks commencing September 8, 2000, subject to the Employer's credit pursuant to 33 U.S.C. § 914(j) in the amount of its past voluntary payment of permanent partial disability compensation based upon a two percent impairment of the left knee;

3. The Employer shall pay the Claimant pursuant to 33 U.S.C. §907 for all reasonable and necessary medical care as required for treatment of his work-related bilateral knee injury;

4. The Employer shall pay the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

5. The Employer shall pay the Claimant's attorney fees and costs in the amount of $10,075.02; and

6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd